91-1807

No. ....

Supreme Court, U.S.
FILED
APR 27 1992
OFFICE OF THE CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1991

STEVEN WEBBER, MARK BALL,
BRAD MAY, NAZIER MAZAREI
and ARAM SHISHMANIAN,
Petitioners,

VS.

GULF OIL CORPORATION, THRIFTY OIL CO.
and CHEVRON U.S.A., INC.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

KENNETH P. ROBERTS
5850 Canoga Avenue
Suite 206
Woodland Hills, CA 91367
(818) 888-3553
Attorneys for Petitioners

QUESTIONS PRESENTED

1. Did the Ninth Circuit Court of Appeal err by dismissing an appeal which was properly taken from a interlocutory order which resulted in the denial of preliminary injunctive relief. This action by the Ninth Circuit Court of Appeal has "so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision."

2. Does a docketing statement which contains all of the information required by Federal Rules of Appellate Procedure, Rule 3(c) constitute a valid notice of appeal. What documents will be accepted as a valid notice of appeal is a question of federal law which has not been, but should be settled by this Court.

3. Has the Ninth Circuit Court of Appeal has adopted a constitutionally invalid standard with respect to the acceptability of a docketing statement as a notice of appeal under Rule 3, Federal Rules of Appellate Procedure, which standard grants access to the judicial process to indigents, while denying access to judicial review for those who are not indigent. Such discriminatory classification, resulting in denial of justice to citizens who have the means to retain legal counsel, is a denial of equal protection and due process of law.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
INTRODUCTION	1
OPINIONS BELOW	4
JURISDICTION	5
STATUTORY PROVISIONS INVOLVED	5
STATEMENT OF CASE	5
A. Factual Summary	5
B. Procedural Summary	7
REASONS FOR GRANTING WRIT OF CERTIORARI	12
A. The Ninth Circuit Court of Appeal erred by dismissing an appeal which was properly taken from a interlocutor order which resulted in the denial of preliminary injunctive relief. This action has "so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision."	12
B. The docketing statement which contains all of the information required by Federal Rules of Appellate Procedure, Rule 3(c) should have been accepted as a notice of appeal. What documents will be accepted as a valid notice of appeal is a question of federal law which has not been, but should be settled by this Court	16

TABLE OF CONTENTS

Page

C. The 9th Circuit has adopted a constitutionally invalid standard with respect to the acceptability of a docketing statement as a notice of appeal under Rule 3, which standard grants access to the judicial process to indigents, while denying access to judicial review for those who are not indigent. Such discrimination resulting in denial of justice to citizens who have the means to retain legal counsel is a denial of equal protection and due process of law 18

CONCLUSION 21

TABLE OF AUTHORITIES

Cases

	Page
Abadjian et al. v. Gulf Oil Corporation, et al., 602 F.Supp. 874 (C.D. Cal. 1984)	4, 8
Bsales v. Texico, Inc., 516 Fed.Sup. 655 (D.N.J. 1981)	2
Donovan v. Esso Shipping Co., 259 F.2d 65 (3d Cir. 1958) Cert. denied 359 U.S. 907, 79 S.Ct. 583, 3 L.Ed.2d 572	17
Fassett v. Delta Kappa Epsilon, 807 F.2d 1150 (3d Cir. 1986)	16
Gardner v. Westinghouse Broadcasting Co., 437 U.S. 478, 98 S.Ct. 241, 57 L.Ed.2d 364 (1978)	15
General Electric Co. v. Marvelle Rare Metals Co., 278 U.S. 430, 53 S.Ct. 202, 77 L.Ed. 408 (1932)	15
Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956)	19
Harper v. Virginia Bd. of Elections, 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966)	19
Hotel and Rest. Emp., et al. v. Rollison, 615 F.2d 788 (9th Cir. 1980)	14
Knight v. Brown Transport Corp., 806 F.2d 479 (3d Cir. 1986)	16
Lubin v. Parish, 415 U.S. 709, 94 S.Ct. 1315, 39 L.Ed.2d 702 (1974)	19
Munden v. Ultra-Alaska Associates, 849 F.2d 383 (9th Cir. 1988)	17, 18, 19
Presiano v. Hoffman-LaRoche, Inc., 726 F.2d 105 (3rd Cir. 1984)	13, 15
Tagupa v. East West Center, Inc., 640 F.2d 1127 (9th Cir. 1980)	14

Table of Authorities

Cases

	Page
Thermatron Products, Inc. v. Hermansdorfer, 423 U.S. 333 (1975)	9
Union Oil Company of California v. O'Riley, 226 Cal.App.3d 199, 276 Cal.Rptr. 483 (1990)	9

Miscellaneous

S.Rep. No. 731, 95th Congress, 2nd Sess. 15, reprinted in 1978 U.S. Code Cong. & Ad. News 873 1

Rules

Federal Rules of Appellate Procedure

Rule 3 4

Rule 3(c) ..... i, 4, 5, 12, 16, 17, 18, 19, 20

Rule 4(a)(4) 15, 16

United States Supreme Court Rules

Rule 10.1(a) 5

Rule 10.1(c) 5

Statutes

United States Code, Title 15

Sec. 2801 et seq. 1

Sec. 2802(b)(2)(E)(iii)(I) 6

Sec. 2805(b)(1) 12

United States Code, Title 28

Sec. 1292 13

Sec. 1292(a)(1) 5, 12, 13, 15, 16

No. ....

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1991

STEVEN WEBBER, MARK BALL,
BRAD MAY, NAZIER MAZAREI
and ARAM SHISHMANIAN,
Petitioners,

VS.

GULF OIL CORPORATION, THRIFTY OIL CO.
and CHEVRON U.S.A., INC.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioners, Steven Webber, Mark Ball, Brad May, Nazier Mazarei and Aram Shishmanian, respectfully petition this court for Issuance of its Writ or Certiorari,

INTRODUCTION

This action involves the Petroleum Marketing Practices Act, 15 U.S.C. § 2801 et seq. (the "PMPA"). The PMPA was enacted June 19, 1978, to establish "minimum Federal standards governing the termination and non-renewal of franchise relationships for the sale of motor fuel by the franchisor or supplier of fuel." S.Rep. No. 731, 95th Congress, 2nd Sess. 15, reprinted in 1978 U.S. Code Cong. & Ad. News 873. Congress was concerned "with the disparity of bargaining power between distributors

and retailers of motor fuel. With this remedial purpose in mind, Congress sought to limit the circumstances in which a distributor could terminate a franchise relationship with the retailer." *Bsales v. Texico, Inc.* 516 Fed.Sup. 655, 661 (D.N.J. 1981).

This action arises out of events which occurred in 1980 and 1981 as a consequence of which Petitioners asserted that they should have be granted a statutorily provided right of first refusal to purchase their service station premises. The legal action to enforce their rights was first commenced in the Superior Court of the State of California, County of Los Angeles, in 1981.

After many years of litigation and multiple appellate proceedings in the California Court of Appeal, Ninth Circuit Court of Appeals, including Petitions for Writ of Certiorari to both the United States and California Supreme Courts on different issues, one trial judge intimately familiar with the proceedings in this action commented, during oral argument:

> "They [Gulf] sold you [Thrifty] the stations only on the condition that they could beat the PMPA with regard to the dealers, didn't they?
>
> * * *
>
> It was up to Thrifty to try to beat the dealers out of their rights, and if Thrifty succeeded in beating the dealers out of their rights, then of course you guys [Gulf] would convey. Wasn't that the cynical deal you hatched up?
>
> * * *
>
> Goodness gracious. It's as plain as the nose on your face that these dealers have the right of first refusal. I don't understand six or seven years of horsing

around, and 20 volumes of files on that issue, other than that Thrifty has just made a very earnest attempt to beat them out of their rights under the PMPA. And Gulf couldn't care less one way or the other.

* * *

Congress enacted these comprehensive statutes, and then the drafting gets a little sloppy, and then big holes are driven into these statutes by lawyers. And then the rights created by federal law, you know, really don't get enforced, as they get enforced only at tremendous expense to those seeking to enforce their rights. And that is exactly what we got here.

This is a case I could write a novel about.

* * *

I could write a novel about this case as an instance of legal oppression. I really could."

This petition for Writ of Certiorari is required as a consequence of the Ninth Circuit Court of Appeals determination to dismiss an appeal from an adverse ruling by the United States District Court. Petitioners appeal of the adverse decision of the District Court was dismissed as a consequence of legal error of the Ninth Circuit Court of Appeal. This error has resulted in substantial injustice to Petitioners who have, since 1981, against enormous odds, vigorously litigated to enforce the federal statutes enacted for their protection.

The issues presented by this petition are:

1. The Ninth Circuit Court of Appeal erred by dismissing an appeal which was properly taken from a interlocutory order which resulted in the denial of preliminary injunctive relief. This action by the

Ninth Circuit Court of Appeal has "so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision."

2. The docketing statement which contains all of the information required by Federal Rules of Appellate Procedure, Rule 3(c) should have been accepted as a notice of appeal. What documents will be accepted as a valid notice of appeal is a question of federal law which has not been, but should be settled by this Court.

3. The Ninth Circuit Court of Appeal has adopted a constitutionally invalid standard with respect to the acceptability of a docketing statement as a notice of appeal under Rule 3, Federal Rules of Appellate Procedure, which standard grants access to the judicial process to indigents, while denying access to judicial review for those who are not indigent. Such discriminatory classification, resulting in denial of justice to citizens who have the means to retain legal counsel, is a denial of equal protection and due process of law.

OPINIONS BELOW

The published opinion of the District Court, during remand proceedings is found in the decision entitled *Abadjian, et al. v. Gulf Oil Corporation, et al.*, 602 F.Supp. 874 (C.D. Cal. 1984).

The following orders or opinions are reproduced in the Appendix to this brief:

1. The order of the United States District Court, Central District of California, dismissing the action in 1988.

2. The opinion of the United States Ninth Circuit Court of Appeal dismissing the appeal.

3. The order of the Ninth Circuit Court of Appeal denying motions for reconsideration and modification, entered January 27, 1992.

JURISDICTION

Jurisdiction for review of the issues outlined in the Introduction to this brief exists pursuant to United States Supreme Court Rules, Rule 10.1(a) and 10.1(c).

STATUTORY PROVISIONS INVOLVED

The underlying action involves the statutory provisions of the PMPA, 15 United States Code Section 2801-2806.

This Petition involves application and interpretation of the provisions of:

1. 28 U.S.C. § 1292(a)(1) which authorizes an appeal directly from an interlocutory order dismissing a complaint wherein the primary relief sought was injunctive relief.

2. Federal Rules of Appellate Procedure, Rule 3(c) which governs contents of notice of appeal.

STATEMENT OF CASE

A. Factual Summary.

In early 1979, having concluded that business was not profitable in Southern California, Gulf Oil Corporation (hereafter "Gulf") announced a plan to sell its Los Angeles Division assets. Shortly thereafter, Thrifty Oil Co. (hereafter "Thrifty") advised Gulf of its interest in

purchasing Gulf's Southern California service stations and by contract dated September 30, 1980, Gulf agreed to sell, and Thrifty agreed to purchase all of Gulf's Los Angeles division service stations. When Gulf entered into the September 30, 1980 agreement with Thrifty, each Petitioner occupied and operated a Gulf service station pursuant to a petroleum franchise governed by the PMPA, which included a lease agreement and gasoline supply agreement between each petitioner and Gulf.

In contemplation of the sale and pursuant to the September 30, 1980 letter agreement, Gulf prepared schedules identifying dealers to whom a right of first refusal was required to be given under governing provisions of the PMPA. Gulf's "List Number 1" identified the Gulf dealers who entered into lease and supply agreements with Gulf after enactment of the PMPA as being those to whom "Gulf must prepare a 90 day notice and offer" of first refusal under the PMPA as required by 15 U.S.C. § 2802(b)(2)(E)(iii)(I). All four Petitioners were identified in Gulf's "List Number 1".

After preparing the list, Gulf mailed to each Petitioner a form letter dated November 24, 1980. That letter informed each Petitioner that Gulf had agreed to sale its service stations to Thrifty and that, as a Gulf dealer, they would receive a right of first refusal if their service stations were included in the sale.

Rights of first refusal were offered to several Gulf service station dealers. After Thrifty learned that certain of the service stations were purchased by Gulf dealers and resold to a competitor of Thrifty, Thrifty objected to the extension of additional rights of first refusal, including the granting to each petitioner of their statutorily provide a right of first refusal. As a result of Thrifty's

complaint, Gulf thereafter refused to offer to these Petitioners the statutorily required right of first refusal.

B. Procedural Summary.

In 1981, as a consequence of Gulf and Thrifty's refusal to comply with the PMPA, these Petitioners, in conjunction with nine other co-plaintiffs, filed legal action in the Los Angeles Superior Court for the County of Los Angeles, State of California. In their complaint, Petitioners asserted that the determination made by Gulf to withdraw from the marketing of petroleum products in Southern California, combined with the executed agreement dated September 30, 1980 with Thrifty, to sell Gulf's interest in their service station premises, constituted an unlawful market withdrawal in violation of Petitioners' rights under the PMPA. In its answer to the complaint, Gulf admitted "that Gulf in 1978 implemented a program for the withdrawal of its national logo and the termination of branded operations in Southern California."

Both Gulf and Thrifty filed cross-complaints against each other. Gulf cross-complained against Thrifty and each Petitioner and interpled the properties. Gulf asked the court to declare whether Petitioners or Thrifty should receive the service station properties. Thrifty filed a cross-complaint against Gulf for claimed breach of contract for Gulf's failure to transfer to Thrifty the service station properties occupied by each Petitioner.

On September 10, 1981, Gulf, pursuant to a joint petition filed with Thrifty, removed the State Court proceeding to the Federal District Court, Central District of California. Upon motion by the Petitioners, the action was remanded to the State Court on the ground that there did not exist a separate and independent controversy and

the jurisdiction of the action properly was in the Superior Court for the County of Los Angeles, State of California.

Thereafter the action proceeded in the State Court. When plaintiffs moved for summary adjudications of issues regarding the PMPA, Gulf and Thrifty filed their second petition for removal to the United States District Court, Central District of California. Petitioners again moved to remand the action, which motion was granted and the Honorable Terry J. Hatter, Jr., issued a published opinion. Doing so, Judge Hatter concluded:

> "Under PMPA, a franchisor's withdrawal from a relevant geographic market can amount to a termination or a non-renewal of the franchise agreement that triggers both notice and first refusal rights for franchisors. See 15 U.S.C. § 2802(b)(2)(E). The undisputed facts indicate that Gulf intended to sale of its assets in the Los Angeles division and to withdrawal from the highly competitive Southern California gasoline market. The subsequent actions taken to sell plaintiffs' leased premises in Santa Fe Springs and the Santa Fe Springs refinery are incidental to Gulf's stated purpose: market withdrawal. For this court to find that the 'packaged' deal involving Thrifty amounted to an assignment of the 'franchise relationship' and not a market withdrawal, would result in a complete circumvention of the act (PMPA). Thus, it is my determined view that Thrifty cannot hold the same status as the franchisor to plaintiffs held by Gulf. At most, Thrifty may have an assignment under the leased premises under state law if Gulf complied with PMPA in the first instance." (*Abadjian, et al. v. Gulf Oil Corporation, et al.*, 602 F.Supp 874, 881 (C.D. Cal. 1984)

Gulf and Thrifty appealed the order of remand. That appeal was dismissed with the Court of Appeal holding that the order of remand was a nonappealable decision under *Thermatron Products, Inc. v. Hermansdorfer*, 423 U.S. 333, 346 (1975).

Thereafter, the action was remanded to the Los Angeles Superior Court. After remand, Petitioners again moved the court for its order granting summary adjudication of issues. Said motion was granted in favor of the Petitioners with the court finding that each Petitioner was entitled to receive a right of first refusal under the PMPA.

Gulf and Thrifty filed an appeal to the California Court of Appeal. On appeal, the California Court of Appeal reversed the judgment finding and holding that, notwithstanding the two previous remands or orders issued by Judge Hatter, that the Los Angeles Superior Court did not have jurisdiction to adjudicate the controversy and that the federal courts had exclusive jurisdiction over the controversy. The decision of the Court of Appeal was not published. In a subsequent published opinion, *Union Oil Company of California v. O'Riley*, 226 Cal.App.3d 199, 276 Cal.Rptr. 483 (1990) the same Circuit of the California Court of Appeal determined, consist with applicable and controlling law, that indeed concurrent jurisdiction existed. Unfortunately, this same argument had been rejected when previously advanced by these Petitioners, and it was too late for these Petitioners to avail themselves of the affect of the published decision which would have upheld the trial court determination.

Petitioners filed petitions for certiorari to both the California Supreme Court and the United Supreme Court as to this exclusivity of jurisdiction issue, both of which

petitions were denied, in each instance with one justice voting to grant hearing.

On December 20, 1988, the instant action was again filed, in the United States District Court, Central District of California. Petitioners reasserted and realleged the same causes of action and the same events upon which Petitioners had previously obtained judgment in the State Court. As in the prior action, Gulf cross claimed and interpled the properties and Thrifty cross-claimed for breach of contract.

On May 17, 1989, Petitioners filed and moved the court for an order granting summary adjudication of issue. At the hearing upon the motion of Petitioners, the court, in an unexpected turnabout from its prior published decision, announced its intention and thereafter proceeded, on its own motion, sua sponte, to dismiss petitioners complaint, with prejudice, concluding that Petitioners had no right of first refusal and that there was no termination of franchise and accordingly no justiciable controversy. Petitioners did not receive prior notice of the court's intent to dismiss. Concurrent with the order dismissing petitioners complaint, the court also issued an order dismissing, with prejudice, each of the cross-claims of Gulf and Thrifty.

Petitioners moved for reconsideration of the order dismissing their claim. Substantially concurrent therewith, Gulf and Thrifty each filed motions for reconsideration and modification of the order dismissing their cross-complaints. Gulf urged the district court to reverse itself and retain jurisdiction over the dispute between Gulf and Thrifty. Thrifty urged the district court to modify its order to provide that dismissal of the cross-complaints was *without* prejudice so that Gulf and Thrifty could thereafter litigate their dispute in the state court.

Petitioners motion for reconsideration was denied without hearing on September 18, 1989. On October 16, 1989, while the motions of Gulf and Thrift were pending, petitioners filed their notice of appeal. At the time of their notice of appeal, a final judgment had not been entered as to the entire action. Final judgment was entered on November 13, 1989. On December 5, 1989, Petitioners filed their docketing statement. The docketing statement contained the following relevant provisions:

1. Identification of appellants.

2. Clear and concise statement of intention to appeal.

3. Identification of the order appealed.

4. Name of the court to which the appeal was taken.

5. Identification of the issues to be argued on appeal.

6. Summary of the trial court proceedings.

Thereafter, Petitioners, Gulf and Thrifty each prepared and filed all appellate briefs. The matter was then submitted to the Ninth Circuit Court of Appeal. While under consideration, the Ninth Circuit Court of Appeal issued its inquiry with respect to the date of denial of Thrifty's motions for reconsideration and modification. Substantially concurrent with responding to this inquiry, Thrifty moved the Ninth Circuit Court of Appeal for its order dismissing petitioners appeal arguing that the notice of appeal was prematurely filed prior to entry of final judgment and that the appeal must be dismissed.

In response to Thrifty's motion to dismiss appeal, Petitioners pointed out: (1) that the appeal was a valid

appeal of an interlocutory order denying injunctive relief prior to final entry of final judgment, which appeal was permissible pursuant to 28 U.S.C. § 1292(a)(1) ....., and (2) the Petitioners' docketing statement filed December 5, 1989 was sufficient to constitute a notice of appeal under the provisions of Federal Rules of appellate procedure Rule 3(c).

The Ninth Circuit Court of Appeal, without hearing or oral argument, dismissed Petitioners appeal concluding that the notice of appeal filed October 16, 1992, was premature, and that although the docketing statement would, under Ninth Circuit decisional law, constitute a valid notice of appeal if petitioners were indigent parties, because petitioners were represented by counsel, the docketing statement would not be accepted as a notice of appeal.

Motions for modification and reconsideration of the determination of the Ninth Circuit Court of Appeal were filed on December 3, 1990. More than one year later, on January 27, 1992, the motions for reconsideration were each denied.

REASONS FOR GRANTING WRIT OF CERTIORARI

A. The Ninth Circuit Court of Appeal erred by dismissing an appeal which was properly taken from a interlocutor order which resulted in the denial of preliminary injunctive relief. This action has "so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision."

Petitioners' complaint requested mandatory injunctive relief pursuant to 15 U.S.C. § 2805(b)(1):

> "In any action under subsection (A) of this section, the court shall grant such equitable relief as the

> court determines as necessary to remedy the effects of any failure to comply with the requirements of § 2803 of this title, including declaratory judgment, *mandatory or prohibitory injunctive relief*, and interin equitable relief. (Emphasis added.)"

It is not disputed that Petitioners' complaint requested both mandatory and prohibitory injunctive relief. In the docket statement filed by Petitioners on December 5, 1989, in subsection (H) thereof, a brief description of the action was given wherein the action was described as one brought pursuant to the PMPA requesting both mandatory and injunctive relief.

The Ninth Circuit Court of Appeal has embarked upon a new path by failure to follow the provisions of 28 U.S.C. § 1292(a)(1). The sua sponte order of the court dismissing petitioners complaint was immediately reviewable upon interlocutory appeal pursuant to the provisions of 28 U.S.C. § 1292. This was discussed in *Presiano v. Hoffman-LaRoche, Inc.*, 726 F.2d 105, 109 (3rd Cir. 1984) wherein the court said:

> "Furthermore, we agree that with plaintiffs second assertion that *the order granting summary judgment for federal defendants is appealable as an 'interrogatory order . . . . refusing to dissolve injunctions.'* 28 U.S.C. § 1292(a)(1)(1976). § 1292(a)(1) has been held to confirm appellate jurisdiction where injunctive relief has been effectively denied although fewer than all claims or all defendants were dismissed (citations) . . . where dismissal of some defendants prevents the plaintiff from obtaining the full injunctive relief requested, or effectively denies relief all together, then an appeal may lie under 1292(a)(1).

> In this case, the grant of summary judgment in favor of federal defendants, although not in terms of refusing an injunction 'have the practical effect of doing so.' *Carson v. American Browns*, 45 U.S. at 83, 101 S. Ct. at 996. Plaintiff had requested an injunction only against the federal defendants, not against the remaining defendants LaRoche. By finding in favor of the federal defendants, the Court 'necessarily decided that upon the facts alleged [the plaintiff was] not entitled to an injunction. *Shirley v. Ben Salem Township*, 63 F.2d at 477; *General Electric Co. v. Marvell Rare Metals Co.*, 278 U.S. 430, 433, 53 S. Ct. 202, 203, 77 L. Ed. 408 (1932). Thus, the order 'passed on the legal sufficiency of the claim for injunctive relief', *Gardner v. Westinghouse Broadcasting Co.* 437 U.S. 478, 481, 98 S.Ct. 2451, 2453, 57 L.Ed.2d 364 (1978), and we have jurisdiction to hear the appeal on this ground.

(See also: *Hotel and Rest. Emp., et al v. Rollison*, 615 F.2d 788, 793 Note 15 (9th Cir. 1980) ["... an order denying the motion for summary judgment is appealable, however, if the effect of the order is to deny a petition for preliminary injunction"], and *Tagupa v. East West Center, Inc.*, 640 F.2d 1127, 1129 (9th Cir. 1980) [Granting of summary judgment and dismissal of complaint seeking injunctive relief appealable as interlocutory order where district court order had the substantial effect of refusing an injunction]).

The order of the Ninth Circuit Court of Appeal, dismissing Petitioners' appeal, has decided an important and critical question of federal law which has not been, but should be, settled by this court. The decision of the Ninth Circuit Court of Appeal creates a new form of order and judgment from which an appeal cannot be taken. It

cannot be disputed that the orders appealed were interlocutory on the date of Petitioners' notice of appeal. The simple fact is that the judgment and order finally adjudicating and disposing of all causes and claims on the merits was not entered as of the date of filing of the notice of appeal on October 16, 1991. The determination of the Ninth Circuit Court of Appeal would result in a conclusion that an order dismissing an action requesting injunctive relief which is otherwise appealable pursuant to 28 U.S.C. § 1292(a)(1) as an interlocutor order, is not appealable where cross-complainants file motions for reconsideration concerning matters not related to the interlocutor order upon which appeal is taken. This decision was contrary to the provisions of 28 U.S.C. § 1292(a)(1). *Presiano v. Hoffman-LaRoche, Inc., supra,* p. 109; *General Electric Co. v. Marvelle Rare Metals Co.,* 278 U.S. 430, 433, 53 S. Ct. 202, 203, 77 L.Ed. 408 (1932); *Gardner v. Westinghouse Broadcasting Co.,* 437 U.S. 478, 481, 98 S. Ct. 241, 253, 57 L.Ed.2d 364 (1978).

It is submitted that the Supreme Court should take this opportunity to clearly announce that orders denying injunctive relief are immediately appealable pursuant to 28 U.S.C. Section 1292(a)(1) and clarify that an order remains interlocutory until entry of the final judgment as to all claims, including cross-claims and counter-claims.

The motion to dismiss the appeal relied upon the provisions of Federal Rules of Appellate Procedure, Rule 4(a)(4). However, such provisions relate solely to tolling the time periods for notice of appeals from final judgments. In the present case, the order appealed from was an appealable interlocutory order denying injunctive relief. It is not disputed that at the time the appeal was filed, no motion was pending that sought to amend, modify or reconsider the order dismissing Petitioner's

complaint thereby denying injunctive relief. It is established law that Rule 4(a)(4) is to "be confined to the specific instances cited in Rules 4(a)(4)", that is motions to modify and amend judgments. *Knight v. Brown Transport Corp.*, 806 F.2d 479, 483 (3d Cir. 1986); and *Fassett v. Delta Kappa Epsilon*, 807 F.2d 1150, 1156 n.8 (3d Cir. 1986).

A grave miscarriage of justice will occur if Petitioners are not permitted to complete their more than 10 year battle to enforce their federal statutory rights. It is submitted that this is a matter deserving of this courts intervention and that this Courts guidance is necessary with respect to the scope and proper application and coordination of the provisions of 28 U.S.C. 1292(a)(1) and Federal Rules of Appellate Procedure, Rule 4(a)(4).

B. The docketing statement which contains all of the information required by Federal Rules of Appellate Procedure, Rule 3(c) should have been accepted as a notice of appeal. What documents will be accepted as a valid notice of appeal is a question of federal law which has not been, but should be settled by this Court.

Federal Rules of Appellate Procedure, Rule 3(c) provides:

> "*Content of the Notice of Appeal.* The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken. . . . An appeal shall not be dismissed for informality of form or title of the notice of appeal."

It has long been the standing rule that an appeal should not warrant dismissal for want of jurisdiction where

intention to appeal from a specific judgment or order may be reasonably inferred from text of notice and where defect has not materially misled appellee. *Donovan v. Esso Shipping Co.*, 259 F.2d 65 (3d Cir. 1958), Cert. denied 359 U.S. 907, 79 S.Ct. 583, 3 L.Ed.2d 572. The Ninth Circuit docketing statement meets these requirements. The document is entitled "CIVIL APPEALS DOCKETING STATEMENT." The docketing statement identifies the parties taking the appeal, the order appealed from, the court from which the appeal was taken, the issues to be presented upon appeal and the nature of the case in the lower court. Indeed, the docketing statement contained more information than normally required for a notice of appeal pursuant to Rule 3(c). (a copy of the Civil Appeals Docketing Statement is reproduced in the Appendix).

All parties recognized that the appeal was intended. Indeed, the appeal was fully briefed by all parties, without objection. Neither Gulf nor Thrifty contended, in any responding brief, that there was a defect in the notice of appeal.

Even the Ninth Circuit recognizes that Docketing Statements can be accepted as a notice of appeal, although it has been limited to appellants not represented by legal counsel. *Munden v. Ultra-Alaska Associates,* 849 F.2d 383 (9th Cir. 1988). Either the docket statement meets the requirements of Rule 3(c) or it does not. Here, it clearly complies with the requirements of Rule 3(c).

It is submitted that the factual circumstances of this case, and the importance of clarity for all circuit courts of appeal what will be acceptable under F.R.C.P., Rule 3(c) is a matter deserving of review and clarification by this Court.

C. The 9th Circuit has adopted a constitutionally invalid standard with respect to the acceptability of a docketing statement as a notice of appeal under Rule 3, which standard grants access to the judicial process to indigents, while denying access to judicial review for those who are not indigent. Such discrimination resulting in denial of justice to citizens who have the means to retain legal counsel is a denial of equal protection and due process of law.

As discussed immediately above, the Ninth Circuit accepts a "Civil Appeals Docketing Statement" as notice of appeal under F.R.C.P., Rules 3(c) under certain circumstances. In *Mundan, supra,* the court said:

> "This court has stated that 'documents which are not denominated notices of appeal will be so treated when they serve the essential purpose showing that the party intended to appeal, are served on the other parties to the litigation, and are filed in court within the time period otherwise provided by Rule 4(a)(4)' . . . . In addition, Federal Rule of Appellate Procedure 3(c) provides that '[a]n appeal shall not be dismissed for informality of form or title of the notice of appeal.'
>
> However, when employing this more lenient standard, we have generally been faced with an appellant not represented by counsel, ... We will not extend any leniency that is not demanded by these cases to one where the party is represented by an attorney." (Id. at 386-387).

Thus, the issue presented by the Ninth Circuit Court of Appeal, is not whether the Civil Appeal Docketing Statement meets the requirements of F.R.C.P., Rule 3(c), but the class of litigant that files the docketing statement. If

the appellant is self-represented or indigent, applying the holding in *Mundan, supra,* results in a finding that the docketing statement will be accepted as a notice of appeal and the appeal will proceed. If however, the appellant has sufficient financial means to retain legal counsel to process the appeal and is not indigent, the very same docketing statement will be rejected as a notice of appeal. This creation of classes of appellants, for applications and interpretation of F.R.C.P., Rule 3(c), is an unconstitutional denial of due process and equal protection of the law.

Classifications based upon wealth, and the consequences of wealth, are "traditionally disfavored." *Harper v. Virginia Bd. of Elections,* 383 U.S. 663, 668, 86 S.Ct. 1079, 1082, 16 L.Ed.2d 169 (1966); *Lubin v. Parish,* 415 U.S. 709, 719, 94 S.Ct. 1315, 39 L.Ed.2d 702 (1974). In the absence of a compelling interest, conduct which creates such classifications and affects material rights, such as access to courts and rights of appeal, cannot withstand judicial scrutiny. As has been stated by this Supreme Court, there "can be no equal justice where the kind of trial a man gets depends on the amount of money he has." *Griffin v. Illinois,* 351 U.S. 12, 19, 76 S.Ct. 585, 100 L.Ed. 891 (1956). See also: *Lubin, supra,* at 791.

While traditionally these constitutional requirements arise in the context of preserving the rights of the indigent, the rule announced is that the law must be blindfolded as to the wealth, means or identity of a litigant. Thus, where a party is denied appellate rights because he has sufficient financial means to retain legal counsel, an impermissible classification occurs with unduly harsh results against the interests of those who have worked hard to develop financial means. This classification cannot be permitted to stand. Either the Ninth Circuit Civil Appeal

Docketing statement meets the requirement of F.R.C.P., Rule 3(c) or it does not. However, the answer to the question cannot be based upon the character or status of the person filing the document. It is submitted that this is an issue of compelling national, and state interest, and one which only this court can resolve. It is submitted that this issue should be resolved at this time to provide guidance to all circuit courts of appeal, to the ninth circuit court of appeal, and to prevent continued application of procedures resulting in constitutionally impermissible classifications based upon wealth and means of the litigant. This court has frequently intervened to protect the right of the indigent or unrepresented party, certainly partys who have sufficient means to retain legal counsel are deserving of like protection from this Court.

CONCLUSION

Petitioners have been engaged in litigation for almost 11 years against substantial odds and virtually every legal obstacle imaginable. Petitioners' appeal should not have been dismissed. It is submitted that the issues presented by this petition are of critical importance not only to these Petitioners but to all appellants and that the Circuit Courts of Appeal require guidance and clarification from this Supreme Court.

Respectfully submitted

KENNETH P. ROBERTS
KENNETH P. ROBERTS,
A Professional Law Corporation
5850 Canoga Avenue, Suite 206
Woodland Hills, California 91367
(818) 888-3553

FILED
SEP 14 1989
Clerk, U.S. District Court
Central District of California

CV 88-7653 TJH (Bx)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JACK ABADJIAN, et al.,
Plaintiffs,

v.

GULF OIL CORPORATION, et al.,
Defendants.

AND RELATED COUNTERCLAIMS
AND CROSS-CLAIMS

MEMORANDUM OPINION

BACKGROUND

Plaintiffs are independent gasoline station operators in possession or control of gasoline stations that have been leased or sub-leased to them by Gulf Oil Corporation ("Gulf"). In their complaint, plaintiffs allege violations of the Petroleum Marketing Practices Act ("PMPA"), 15 U.S.C. §§ 2801-2805, and seek a declaration that Gulf is required to give plaintiffs a right of first refusal to purchase the properties that they possess or control. Jurisdiction is pursuant to 15 U.S.C. § 2805(a).

In 1978, Gulf decided to withdraw from the Southern California retail gasoline market. Gulf agreed to sell its interest in gasoline stations in the area to Thrifty Oil Company ("Thrifty") in September, 1980. The plaintiffs' stations were included in the stations Gulf agreed to sell to Thrifty.

After Gulf notified the independent operators about the Thrifty sale, the relationship between Gulf and the independent operators deteriorated. In August, 1981, plaintiffs filed their original complaint in state court alleging, *inter alia*, violations of the PMPA because Gulf did not offer plaintiffs first refusal rights before closing the sale to Thrifty. That action was removed and, subsequently, remanded. *Abadjian v. Gulf Oil Corp.*, 602 F.Supp. 874, 879 (C.D. Cal. 1984) ("*Abadjian I*"). The action was eventually dismissed by the California Court of Appeal on the ground that federal courts have exclusive jurisdiction of claims asserted under PMPA.

At all times since the 1980 Gulf/Thrifty agreement, plaintiffs have remained in possession or control of the properties. Gulf has not transferred the properties to Thrifty. Gulf has not cut off the supply of gasoline or other petroleum products to plaintiffs. When the plaintiffs refused to pay rent, Gulf obtained a state court order, pursuant to Cal. Code Civ. Proc. § 1174, requiring the dealers to pay rent. That order was upheld in *Abadjian v. Superior Court*, 168 Cal.App.3d 363, 214 Cal. Rptr. 234 (1985).

Following the state court's dismissal, plaintiffs were permitted to bring this action, this Court having determined that the one-year limitation provision of PMPA, 15 U.S.C. § 2805(a), was equitably tolled.

Plaintiffs moved for summary adjudication of the issues. For the reasons discussed below, the Court concludes that plaintiffs were never terminated; therefore, they are not entitled to relief under PMPA, and the entire action is dismissed *sua sponte*.

DISCUSSION

PMPA was enacted to protect independent gasoline station operators, "franchisees", from arbitrary termination or nonrenewal.† To obtain relief, the franchisee has the burden, under 15 U.S.C. § 2805(c), of proving termination or nonrenewal. To meet this burden, the franchisee must prove that the franchisor breached the franchise agreement. *May-som Gulf, Inc. v. Chevron U.S.A., Inc.*, 869 F.2d 917, 922 (6th Cir. 1989); *see also Fresher v. Shell Oil Co.*, 846 F.2d 45, 46 (9th Cir. 1988). Termination of the supply component of a franchise agreement occurs when the franchisor cuts off the supply of gasoline and other products. *Wisser Co. v. Texaco, Inc.*, 529 F.Supp. 727, 730 n.4 (S.D.N.Y. 1981).

It is undisputed that Gulf did not cut off the supply of gasoline to plaintiffs. It is, also, undisputed that plaintiffs have had continuous possession or control of the properties. Such occupancy, and the sale of gasoline obtained from Gulf, is inconsistent with a claim of termination. *See Halder v. Standard Oil Co.*, 642 F.2d 107, 111 (5th Cir. 1981).

There are no genuine issues of material fact regarding essential allegations of the complaint. The plaintiffs have not been terminated by Gulf and their right to first refusal has not yet arisen. Gulf did not breach the franchise agreement, and the plaintiffs have not had any PMPA rights violated.

Therefore, the complaint is dismissed.

---

†This Court has already ruled that the plaintiffs are Gulf franchisees as defined by PMPA, 15 U.S.C. § 2801. *Abadjian I*, 602 F.Supp. at 879.

The remaining counterclaims and cross-claims are essentially the same as those currently before the Los Angeles Superior Court in *Abadjian v. Gulf Oil Corp.*, C 377024. Since the federal questions have been resolved, this Court reevaluates its jurisdiction, *United States v. City of Twin Falls, Idaho,* 806 F.2d 862, 868 (9th Cir. 1986), *cert. denied,* 482 U.S. 914, 107 S.Ct. 3185, 96 L.Ed.2d 674 (1987). Following the advice of the Supreme Court in *United Mine Workers of America v. Gibbs,* 383 U.S. 715, 726, 86 S.Ct. 1130, 1139, 16 L.Ed.2d 218, 228 (1966), the state claims are dismissed.

Date: September 13, 1989

TERRY J. HATTER, JR.
United States District Judge

FILED
SEP 14 1989
Clerk, U.S. District Court
Central District of California

CV 88-7653 TJH (Bx)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JACK ABADJIAN, et al.,
Plaintiffs,

v.

GULF OIL CORPORATION, et al.,
Defendants.

AND RELATED COUNTERCLAIMS
AND CROSS-CLAIMS

JUDGMENT

The Court having considered the papers and the arguments of counsel in this case, and a decision having been duly rendered;

IT IS ORDERED AND ADJUDGED that plaintiffs, counterclaimants and cross-claimants take nothing and that each party is to bear its own costs.

Date: September 13, 1989

TERRY J. HATTER, JR.
United States District Judge

FILED
SEP 14 1989
Clerk, U.S. District Court
Central District of California

ENTERED
Clerk, U.S. District Court
SEP 18 1989
Central District of California

CV 88-7653 TJH (Bx)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JACK ABADJIAN, et al.,
Plaintiffs,

v.

GULF OIL CORPORATION, et al.,
Defendants.

AND RELATED COUNTERCLAIMS
AND CROSS-CLAIMS

ORDER

The Court having considered the papers and the arguments of counsel in this case, and for good cause shown;

IT IS ORDERED that the entire section, including counterclaims and cross-claims, is dismissed with prejudice.

Date: September 13, 1989

TERRY J. HATTER, JR.
United States District Judge

Court of Appeals Docket Number
89-56189

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
P.O. Box 547
San Francisco, CA 94101

YOU MUST FILE AN ORIGINAL AND ONE COPY OF THIS FORM WITH THE CLERK OF THIS COURT WITHIN 14 CALENDAR DAYS OF THE DATE THE FORM IS SENT BY THE CLERK. YOU MUST ATTACH TO THE ORIGINAL AND TO THE COPY OF THIS FORM (1) A COPY OF THE JUDGMENT OR ORDER APPEALED FROM, (2) A COPY OF ANY OPINION OR FINDINGS OF FACT AND CONCLUSIONS OF LAW SUPPORTING THE JUDGMENT OR ORDER, AND (3) PROOF OF SERVICE ON OPPOSING COUNSEL.

CIVIL APPEALS DOCKETING STATEMENT

Case Name: Jack Abadjian, et al. v. Gulf Oil Corporation, et al., District Court/Agency: U.S. District Court of California, Central District, District Court/Agency Docket No.: CV88-7653 TJH (Bx), District Judge: Terry J. Hatter, Party filing appeal/petition: Plaintiffs, Jack Abadjian, et al.

A. Timeliness of Appeal or Petition for Review or Enforcement: (1) Date of entry of judgment or order: September 18, 1989, (2) Service date of any post-judgment motion (other than motion for fees and costs): Gulf Sept. 22, 1989, Thrifty Sept. 28, 1989, (3) Date of entry of order deciding post-judgment motion: Gulf Oct. 26, 1989, Thrifty Nov. 13, 1989, (4) Date notice of appeal or petition filed: October 16, 1989, (5) Last day for filing

appeal or petition: December 13, 1989, (6) Authority fixing time limit for filing appeal or petition: Fed. R. App. P. 4(a)(1) _____ Fed. R. App. P. 4(a)(2) _____ Fed. R. App. P. 4(a)(3) _____ Fed. R. App. P. 4(a)(4) __x__ Fed. R. App. P. 4(a)(5) _____ Other _____

B. Appeal from District Court: (1) Is the order appealed from a final order (i.e., does it dispose of the action as to *all* claims by *all* parties? yes. (2) If the order is not a final disposition as to all claims by all parties, did the district court direct the entry of judgment in accordance with Fed. R. Civ. P. 54(b)? n/a. (3) If not final, is the order appealable as the grant or denial of an injunction under 28 U.S.C. § 1292(a)(1)? n/a. (4) If none of the above applies, what is the basis for appellate jurisdiction? n/a.

I. Issues to be Raised on Appeal: 1. Did the District Court error by dismissing Plaintiffs' action upon the District Court's own motion upon the ground for failure to state a claim under the PMPA? 2. Did the District Court error by denying Plaintiffs' Motion for Reconsideration of Order Dismissing Plaintiff's Complaint.

J. Standard of Appellant Review (Specify the proper standard of review to be applied by the court for each issue to be raised, citing relevant authority): Strict Scrutiny *Albrecht v. Lund*, 845 F.2d 193, 195 (9th Cir. 1988)

K. Do you believe that settlement is feasible in this case? No. Why or why not? The parties have previously attempted to settle this matter. However, this action actually involves a dispute between the Plaintiffs, service station franchisees, Gulf, franchisor and selling party of properties, and Thrifty, non-franchisor and party desirous of purchasing the property. The properties have

appreciated substantially in value and previous attempts to settle have been unsuccessful.

L. Would a prebriefing conference be useful in this case? No. Why or why not? The District Court has exclusive jurisdiction over actions arising under the PMPA. A final judgment and order of dismissal have been entered. It is not reasonably believed that there are any grounds for settlement. The issues are relatively narrow recognizing that pre-trial dismissal on the Court's own motion is the subject matter of review. Joint briefing is not possible because all parties have conflicting interests. There presently exist litigation between Gulf and Thrifty.

FILED
SEPTEMBER 14, 1989
Clerk, U.S. District Court
Central District of California

CV 88-7653 TJH (Bx)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JACK ABADJIAN, et. al.,

Plaintiffs,

v.

GULF OIL CORPORATION, et al.,

Defendants.

AND RELATED COUNTERCLAIMS
AND CROSS-CLAIMS

ORDER

The Court having considered plaintiffs' motion for reconsideration, together with the moving and opposing papers;

IT IS ORDERED that the motion be, and hereby is, DENIED.

Date: September 13, 1989

TERRY J. HATTER, JR.

Terry J. Hatter, Jr.
United States District Judge

FILED
SEPTEMBER 14, 1989
Clerk, U.S. District Court
Central District of California

CV 88-7653 TJH (Bx)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JACK ABADJIAN, et. al.,

Plaintiffs,

v.

GULF OIL CORPORATION, et al.,

Defendants.

AND RELATED COUNTERCLAIMS
AND CROSS-CLAIMS

ORDER

The Court having considered the papers and the arguments of counsel in this case, and for good cause shown;

IT IS ORDERED that the entire action, including counter-claims and cross-claims, is dismissed with prejudice.

Date: September 13, 1989

TERRY J. HATTER, JR.

Terry J. Hatter, Jr.
United States District Judge

FILED
SEPTEMBER 14, 1989
Clerk, U.S. District Court
Central District of California

CV 88-7653 TJH (Bx)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JACK ABADJIAN, et. al.,

Plaintiffs,

v.

GULF OIL CORPORATION, et al.,

Defendants.

AND RELATED COUNTERCLAIMS
AND CROSS-CLAIMS

JUDGMENT

The Court having considered the papers and the arguments of counsel in this case, and a decision having been duly rendered;

IT IS ORDERED AND ADJUDGED that plaintiffs, counterclaimants and cross-claimants take nothing and that each party is to bear its own costs.

Date: September 13, 1989

TERRY J. HATTER, JR.

Terry J. Hatter, Jr.
United States District Judge

FILED
NOVEMBER 9, 1989
Clerk, U.S. District Court
Central District of California

DONALD C. SMALTZ
LEIGHTON M. ANDERSON
THEODORE G. SPANOS
MORGAN, LEWIS & BOCKIUS
Twenty-Second Floor
801 South Grand Avenue
Los Angeles, California 90017-3189
Telephone: (213) 612-2500
Attorneys for Thrifty Oil Co.

Case No. CV 88-7653 TJH (Bx)

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JACK ABADJIAN, MARK BALL, JOSEPH BROWN, JOHN EGHENIAN, BRAD MAY, NAS MAZAREI, DONALD PROUSE, AL ROSENSTEIN, ARAM SHISHMANIAN, JOE SMIDERLE and STEPHEN WEBBER,
Plaintiffs,

v.

GULF OIL CORPORATION, a Pennsylvania corporation, CHEVRON U.S.A. INC., a Pennsylvania corporation and THRIFTY OIL COMPANY, a California corporation,
Defendants.

AND COUNTERCLAIM AND CROSS-CLAIM

[PROPOSED] AMENDED ORDER DISMISSING ACTION

The Court's Order, dated September 13, 1989, relating to the dismissal of the complaint and all counterclaims

and cross-claims in the action, is amended to provide as follows:

The Court having considered the papers and arguments of counsel in this case and for good cause shown;

IT IS ORDERED that plaintiffs' Complaint is dismissed with prejudice. The remaining counterclaims and cross-claims are dismissed without prejudice.

IT IS SO ORDERED.

Dated: October 26, 1989

TERRY J. HATTER, JR.
United States District Judge

Presented on October 25, 1989, by:

DONALD C. SMALTZ
LEIGHTON M. ANDERSON
MORGAN, LEWIS & BOCKIUS

By LEIGHTON M. ANDERSON
Attorneys for Thrifty Oil Co.

FILED
NOVEMBER 9, 1989
Clerk, U.S. District Court
Central District of California

ENTERED
NOVEMBER 13, 1989
Central District of California

DONALD C. SMALTZ
LEIGHTON M. ANDERSON
THEODORE G. SPANOS
MORGAN, LEWIS & BOCKIUS
Twenty-Second Floor
801 South Grand Avenue
Los Angeles, California 90017-3189
Telephone: (213) 612-2500
Attorneys for Thrifty Oil Co.

Case No. CV 88 7653 TJH (Bx)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JACK ABADJIAN, MARK BALL, JOSEPH BROWN, JOHN EGHENIAN, BRAD MAY, NAS MAZAREI, DONALD PROUSE, AL ROSENSTEIN, ARAM SHISHMANIAN, JOE SMIDERLE and STEPHEN WEBBER,
Plaintiffs,

vs.

GULF OIL CORPORATION, a Pennsylvania corporation, CHEVRON U.S.A., INC., a Pennsylvania corporation, and THRIFTY OIL CORPORATION, a California corporation,
Defendants.

AND COUNTERCLAIM AND CROSS-CLAIM.

AMENDED JUDGMENT

The Judgment in the above action dated September 13, 1989, is amended to provide as follows:

The Court having considered the papers and arguments of counsel in this case, and a decision having been duly rendered;

IT IS ORDERED AND ADJUDGED that plaintiffs take nothing by their Complaint which is dismissed with prejudice. The remaining counterclaims and cross-claims are dismissed without prejudice. Each party shall bear his or its own costs.

DATED: October 26, 1989

TERRY J. HATTER, JR.
U.S. District Judge

Presented on October 25, 1989, by:

DONALD C. SMALTZ
LEIGHTON M. ANDERSON
MORGAN, LEWIS & BOCKIUS

By LEIGHTON M. ANDERSON
Attorneys for Thrifty Oil Co.

(PROOF OF SERVICE BY MAIL — 1013a, 2015.5 C.C.P.)

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am a resident of/employed in the aforesaid county, State of California; I am over the age of eighteen (18) years and not a party to the within action; my business address/residence address is: 5850 Canoga Avenue, Suite 206, Woodland Hills, CA 91367. I am readily familiar with the business' practice for collection and processing of correspondence for mailing with the United States Postal Service, and the fact that the correspondence would be deposited with the United States Postal Service that same day in the ordinary course of business.

On Nov. 30, 1989, I served the foregoing Civil Appeals Docketing Statement on interested parties in this action by placing a true copy thereof, enclosed in a sealed envelope on this date at Woodland Hills, CA, and placed for collection and mailing on this date following ordinary business practices addressed as follows:

JACK D. FUDGE, ESQ.
McCUTCHE, BLACK, VERLEGER & SHEA
600 Wilshire Boulevard
Los Angeles, CA 90017

LEIGHTON ANDERSON, ESQ.
MORGAN, LEWIS & BOCKIUS
801 S. Grand Avenue
Suite 2200
Los Angeles, CA 90017

I certify (or declare) under penalty of perjury under the laws of the State of California, that the foregoing is true and correct.

Date: Nov. 30, 1989

Linda Loy

Full Name of Declarant

Signature of Declarant

No. 89-56189
DC# CV-88-7653-TJH
Central California

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JACK ABADJIAN, *et al.*,
Plaintiffs-Appellants,

vs.

GULF OIL CORPORATION, *et al.*,
Defendants-Appellees.

ORDER

Before: ALARCON, POOLE and NORRIS, Circuit Judges

Gulf Oil's postjudgment motion of September 22, 1989 tolled the time for appeal. Because Gulf Oil's motion was pending when the notice of appeal was filed, the notice of appeal had no effect. *See* Fed. R. App. P. 4(a); *Bestran Corp. v. Eagle Comtronics, Inc.*, 720 F.2d 1019, 1019 (9th Cir. 1983). This is true even if Thrifty Oil's motion of September 28, 1989 is properly construed as a motion pursuant to Fed. R. Civ. P. 60(b). *See Clarkson v. Internal Revenue Service*, 678 F.2d 1368, 1371 n.2 (11th Cir. 1982). In addition, because appellants are represented by counsel, their Civil Appeals Docketing Statement cannot substitute as a notice of appeal. *See Munden v. Ultra-Alaska Associates*, 849 F.2d 383, 387-88 (9th Cir. 1988). Accordingly, appellees' motion to dismiss this appeal for lack of jurisdiction is granted.

No. 89-56189

DC# CV-88-7653-TJH
Central California

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JACK ABADJIAN, *et al.*,
Plaintiffs-Appellants,
vs.
GULF OIL CORPORATION, *et al.*,
Defendants-Appellees.

ORDER

Before: ALARCON, POOLE and NORRIS,
Circuit Judges

Appellants' petition for rehearing/motion for reconsideration is denied in its entirety. Appellees' request for sanctions is also denied.

No further filings shall be accepted in this closed docket.

Ordered not dated.
Order filed January 27, 1992.